IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

EUGENE L. SWANN, Plaintiff, v. US FOODS, INC., Defendant.	Civil Action No. 1:14-cv-1409

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Defendant, US Foods, Inc., by and through its undersigned counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure, hereby submits this memorandum of points and authorities in support of its motion for summary judgment.

INTRODUCTION

Plaintiff was discharged from his job as a Delivery Driver at US Foods because he violated US Foods' policy against workplace violence when he got into an altercation with another driver. Plaintiff's employment at US Foods ended because he allowed the situation with the other driver to escalate to the point where a supervisor had to physically restrain Plaintiff in order to separate the two drivers. Plaintiff's dissatisfaction with US Foods' decision to discharge him for this conduct has led him to assert that his discharge had no less than four different illegal motives. However, the record evidence demonstrates that Plaintiff was actually discharged because of his role in the altercation with the other driver (who was also discharged), and no reasonable jury could conclude that US Foods' stated reason for Plaintiff's discharge was a pretext for either discrimination or retaliation. For these reasons and those stated in detail below, US Foods is entitled to judgment as a matter of law on Plaintiff's Complaint.

I. STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

A. Plaintiff's Employment With US Foods

1. Plaintiff was formerly employed by US Foods in its Manassas division as a driver. Pl. Dep. 18-19.[1] There are approximately 90 drivers in the Manassas division of US Foods. Pillion Dep. 17.[2]

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[1] Excerpts from the transcript of Plaintiff's deposition, as well as deposition exhibits, cited herein are attached as Exhibit 1.

[2] Excerpts from the transcripts of the depositions of Pam Ayers, Rick Barrett, Kelvin Howard, Mike Pillion and Dede Rutherford cited herein are attached (in alphabetical order) at Exhibit 2.

2. US Foods has always had a zero tolerance policy as it relates to workplace violence. Rutherford Dep. 137. However, US Foods implemented a new workplace violence policy in 2011 and issued a set of standard operating procedures to implement the policy. Rutherford Dep. 136-38.

3. The new policy and SOP was the product of a “heightened awareness” and new emphasis from US Foods’ corporate department regarding the workplace violence policy. Rutherford Dep. 137; Barrett Dep. 19-22.

4. As a result of the new policy and SOP, Dede Rutherford, the Human Resources Manager for US Foods’ Manassas Division, began, as a matter of course, involving the Director of Safety and Security, John Powers, and the US Foods legal department in any alleged violation of the workplace violence policy. Rutherford Dep. 138.

5. Ms. Rutherford came to the Manassas division as HR Manager in 2007. Rutherford Dep. 125. Rick Barrett came to the Manassas division as President of the division in 2009. Barrett Dep. 21.

6. Since Ms. Rutherford and Mr. Barrett have been at the Manassas division, any employee who has violated the workplace violence policy has been discharged. Answer to Interrogatory No. 5 of Plaintiff’s First Set of Interrogatories; Rutherford Dep. 120; Barrett Dep. 13-14.

7. During the course of his employment, Plaintiff acknowledged on a number of occasions his awareness and understanding of US Foods’ policy against workplace violence and/or US Foods’ Associate Handbook, which contains a copy of its workplace violence policy. Pl. Dep. Exs. 2, 3, 5; Rutherford Dep. 138.

8. Plaintiff was also aware of and received a copy of US Foods' FMLA policy. Pl. Dep. 57; Pl. Dep. Ex. 10.

9. While employed by US Foods, Plaintiff took approximately three months of FMLA leave in late 2008 and early 2009. Pl. Dep. 48; Pl. Dep. Ex. 7. Plaintiff returned to work after his leave. Pl. Dep. 48-49, 51. In connection with the 2008-2009 leave, Plaintiff received written notice of his rights under the FMLA. Pl. Dep. 56; Pl. Dep. Ex. 9.[3]

B. Plaintiff's June 2012 Injury

10. On June 27, 2012, Plaintiff reported that he sustained an injury to his arm while making a delivery at Mercy Medical Center. Pl. Dep. 64. Plaintiff called supervisor Fred Butym who instructed Plaintiff to go to the emergency room. Pl. Dep. 65, 68.

11. Plaintiff was seen in the emergency room at Mercy Medical Center and discharged the same day without being placed under any work restrictions. Pl. Dep. Ex. 11.

12. When Plaintiff returned to the Manassas division yard after being seen in the emergency room, Human Resources Coordinator Pamela Ayers told him to go for an evaluation at one of the clinics available to US Foods employees who have reported a workplace injury. Pl. Dep. 68-69. Plaintiff went that same day, June 27, to a walk-in clinic called Patient First to be examined. Pl. Dep. Ex. 12.

13. The health care providers at Patient First restricted Plaintiff to lifting no more than 10 pounds. Pl. Dep. 10. They also advised Plaintiff to consult with an orthopedist. Pl. Dep. 70.

14. Plaintiff went to see an orthopedist, Dr. John Biddulph, on June 29, 2012. Pl. Dep. 76; Pl. Dep. Ex. 13 at pp. 1-3. Dr. Biddulph stated that Plaintiff could continue driving but

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[3] US Foods' records also reflect that Plaintiff took FMLA leave in April 2011. Pl. Dep. Ex. 6. However, Plaintiff does not recall taking leave in 2011. Pl. Dep. 46-47.

needed to be placed on a light duty with a 25-pound lifting restriction. *Id.*; Pl. Dep. Ex. 16. Dr. Biddulph also had Plaintiff fitted with a splint to wear on his wrist at night, with use during the day being optional. *Id.* Dr. Biddulph also requested a neurology consultation for Plaintiff. *Id.*

15. None of the doctors Plaintiff consulted regarding his June 2012 injury stated he needed to be off from work. See Pl. Dep. Exs. 11-13, 17.[4]

C. Plaintiff Continues To Work After June 2012 Injury With Restrictions

16. On June 29, 2012, Mr. Griffith sent an email to the transportation management team and human resources personnel in Manassas, stating that Plaintiff was being placed on light duty. Pl. Dep. Ex. 15.

17. On June 30, 2012, Plaintiff signed a Transitional Work Agreement ("TWA") regarding his light duty work. Pl. Dep. Ex. 14. When Ms. Ayers gave Plaintiff the TWA, she told him that US Foods would find someone to ride with him in the truck to load or unload the groceries for him while on light duty. Pl. Dep. 85.

18. In the TWA, Plaintiff acknowledged that it was his "personal responsibility to maintain his limited duty status for as long as it is in effect" and to notify his supervisor immediately if he was "asked to perform a task which is outside of the restrictions" outlined in the TWA. Pl. Dep. Ex. 14.

19. Plaintiff admits that, during the period he was on light duty, he either drove on his delivery route with a temporary employee or performed office work. Pl. Dep. 78, 87-89.

[4] Pl. Dep. Exs. 11-13 and 17 contain medical records of Plaintiff. Defense counsel is waiting to hear back from plaintiff's counsel about whether Plaintiff consents to have these documents filed in the normal course with his date of birth redacted or Plaintiff wishes to request an order for leave to file them under seal. Once defense counsel has conferred with Plaintiff's counsel, they will file these documents or a motion depending on Plaintiff's response.

Plaintiff also testified in his deposition that he does not recall anyone instructing him to work outside his restrictions while he was on light duty. Pl. Dep. 211.

D. Plaintiff Is Released Back To Full Duty.

20. Plaintiff had been on light duty for approximately two weeks when Dr. Biddulph released him back to full duty on July 16, 2012. Pl. Dep. 77.

21. After being released to full duty by Dr. Biddulph on July 16, Plaintiff was not under any work restrictions up to and through the date of his discharge. Pl. Dep. 211.

22. Plaintiff did not take any time off from work for the June 2012 injury, except to attend doctor's appointments. Pl. Dep. 55. Plaintiff took a pre-planned vacation to the Bahamas from July 27, 2012 to August 12 or 13, 2012. Pl. Dep. 94-95. This vacation had been scheduled in January or February of 2012 and was not scheduled as a result of Plaintiff's June 2012 injuries. Pl. Dep. 55, 95.

23. Plaintiff filed a claim for workers compensation benefits in connection with his June 2012 injury. Pl. Dep. 137, 161. When employees apply for workers compensation benefits, it is Ms. Pam Ayers' responsibility to schedule appointments for them with doctors they select from panels provided by US Foods' third party administrator, Gallagher Bassett. Ayers Dep. 4, 6, 20.

24. Once Ms. Ayers makes the appointments, she informs the transportation department so that they can schedule the employee accordingly. Ayers Dep. 14.

25. As Transportation Manager Mike Pillion testified, most employees want to work if they can, so the transportation department schedules them in such a way as to get them back in time for the appointment. Pillion Dep. 54-55. Ms. Ayers generally schedules appointments late in the day for drivers so they have sufficient time to get back from work to attend them. Ayers. Dep. 51.

26. Ms. Ayers provided Plaintiff with notes regarding the date, time and location of his doctors' appointments. Ayers Dep. 49.[5]

E. The October 26 Altercation Between Plaintiff and Mr. Abdullah

27. In the early morning of October 26, 2012, Plaintiff and another Delivery Driver, Al-Sayid Abdullah, became involved in an altercation in the Manassas division yard.

28. The altercation continued until the two men were physically separated by Mr. Butym. Plaintiff, whose shift was over, was instructed to go the transportation office and write a statement about the incident. Pillion Dep. 76, 87.

29. In his handwritten statement, Plaintiff admitted that, in response to a statement Mr. Abdullah made to him, "I said if you want to get it on you can come out of the gate and we can - you can do what you want to do or we can get it on." Pl. Dep. Ex. 20.

30. When Mr. Pillion arrived at work, he reviewed Plaintiff's written statement and asked Plaintiff, "Is this what you said?" Plaintiff responded, "yes." Pillion Dep. 90.

31. When Ms. Rutherford arrived at work on October 26, she began an investigation into the incident between Plaintiff and Mr. Abdullah.

32. Ms. Rutherford contacted John Powers, US Foods' Director of Safety and Security, and reported the incident to the US Foods "Check-In Line." Rutherford Dep. 36-37. She gathered statements from Plaintiff, Mr. Abdullah, Mr. Butym, and Yard Jockey Bobby Summers, who was in the yard when the altercation occurred.

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[5] Plaintiff missed two doctors' appointments because he did not get back from his route in time. Pl. Dep. 206. Plaintiff recalls one of the instances and testified he missed a 5:00 p.m. appointment with Dr. Michael Cohen, a neurologist, on August 22 because he was not able to get back in time from his route. Pl. Dep. 92-93. Plaintiff ultimately saw Dr. Cohen on September 20. Pl. Dep. 90-91; Pl. Dep. Ex. 17. Plaintiff also recalls telling Ms. Ayers to reschedule an appointment that she had made for him on July 27 because, although he had not left on his trip to the Bahamas, he was taking a vacation day on the 27th and did not want to go to the appointment. Pl. Dep. 93-94.

33. In his statement, Mr. Abdullah admitted that, in response to Plaintiff saying "don't get smacked in the face this morning," he said, "If you put your hands on me, you'll get what you're looking for." Declaration of Karla Grossenbacher at Att. A.[6]

34. When Mr. Abdullah returned from his route in the late afternoon of October 26, Mr. Pillion brought him to meet with Ms. Rutherford in her office. Mr. Abdullah was suspended pending investigation during this meeting. Rutherford Dep. 65. Ms. Rutherford also called Plaintiff that same afternoon and informed him that he was suspended pending investigation. Pillion Dep. 91.

35. In addition to reviewing the statements, Ms. Rutherford also spoke to Plaintiff, Mr. Abdullah, Mr. Summers, Mr. Butym and two transportation supervisors, David Joines and Jerry Griffith,[7] during the course of her investigation.

36. When he spoke with Ms. Rutherford on the phone, Plaintiff confirmed that he made the statement about going "outside the gate" that was in his handwritten statement. Pl. Dep. 134; Rutherford Dep. 116-17.

37. Plaintiff also told Ms. Rutherford that, in response to Mr. Abdullah saying he could punch hard, Plaintiff said, "You can hit hard. I can hit hard. Let's see who can hit the hardest." Pl. Dep. 152-53.

38. In his statement, Mr. Butym noted that he had to step between Plaintiff and Mr. Abdullah -- facing Plaintiff -- because, "they would not stop," and that he had to physically take hold of Plaintiff and separate the two men. Grossenbacher Decl. at Att. B. Mr. Butym reiterated

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[6] The declaration of Karla Grossenbacher is attached hereto as Exhibit 2.

[7] Ms. Rutherford thought Mr. Joines and Mr. Griffith might have seen or heard the altercation because they had worked the morning of the 26th, but neither witnessed the altercation. Rutherford Dep. 72-73.

to Ms. Rutherford when she interviewed him that he "had to physically grab [Plaintiff] to stop him." Rutherford Dep. 51.

39. Mr. Summers, who was present in the yard during the altercation, confirmed when he spoke to Ms. Rutherford that Mr. Butym restrained Plaintiff and not Mr. Abdullah. Rutherford Dep. 62-63.

40. Based on the foregoing, US Foods determined that both Plaintiff and Mr. Abdullah had violated the US Foods' policy against workplace violence.

41. The decision to discharge Plaintiff and Mr. Abdullah was made among the following individuals during a conference call with in-house legal counsel on November 1, 2012: Adrienne Christmas, H.R. Business Partner for the Atlantic Region, Rick Barrett, Division President for the Manassas Region, Maureen Weldon, then Compliance Manager, Ms. Rutherford, David Bunk, Vice President of Operations, Mr. Pillion and John Powers, Director of Safety and Security. Defendant's Answers and Objections to Plaintiff's Interrogatory No. 3; Rutherford Dep. 11-12.

42. Plaintiff and Mr. Abdullah were both discharged on November 1, 2012. Pl. Dep. 154-55; Grossenbacher Decl. at Att. C.

ARGUMENT

"Summary judgment is not a 'disfavored procedural shortcut,' but is an important mechanism for weeding out claims and defenses [that] have no factual basis." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). A movant is entitled to summary judgment if the pleadings, depositions, and affidavits demonstrate that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); *Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 700 (4th Cir. 2001). Because the plaintiff has the burden of proof, a defendant moving for summary judgment need only show the absence of evidence to support the plaintiff's case; the defendant is not required to negate the plaintiff's claims. *Celotex Corp., 477 U.S. at 325*. Summary judgment is particularly appropriate where, as here, the record evidence would not support a verdict by a reasonable jury in favor of the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In his Complaint, Plaintiff alleges that US Foods (1) discriminated against him based on a disability or perceived disability in violation of the Americans with Disabilities Act (ADA); (2) retaliated against him in violation of the ADA; (3) retaliated against him in violation of the Family and Medical Leave Act ("FMLA"); and (4) discriminated against him based on his national origin (Bahamian) in violation of Title VII of the Civil Rights Act of 1964. Because, as a matter of law, Plaintiff has no direct evidence of discrimination or retaliation, he must attempt to prove his claim through circumstantial evidence. Thus, Plaintiff's claims of national origin and disability discrimination, as well as his claims of FMLA and ADA retaliation, are subject to the burden-shifting framework set forth in the Supreme Court's decision in *McDonnell-Douglas v. Green,* 411 U.S. 792 (1973). *See e.g., Perry v. Computer Sciences Corp.*, 429 F. Appx. 218, 219-20 (4th Cir. 2011) ("Disability discrimination and retaliation claims under the ADA and Rehabilitation Act are evaluated under the *McDonnell Douglas Corp. v. Green*, "pretext" framework.") (internal citations omitted); *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 550-51 (4th Cir. 2006) ("FMLA claims arising under the retaliation theory are analogous to those derived under Title VII and so are analyzed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*.") (internal citations omitted).

Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of establishing a *prima facie* case of unlawful discrimination. *See Burdine,* 450 U.S. at 253. If the plaintiff establishes a *prima facie* case, the burden of production shifts to the defendant to articulate a credible, legitimate, non-discriminatory explanation for its decision. *Burdine*, 450 U.S. at 253. Once the defendant articulates such an explanation, “the presumption [of discrimination] raised by the *prima facie* case is rebutted and drops from the case.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). The burden of production then shifts back to the plaintiff and merges with the plaintiff’s ultimate burden to prove that he has been the victim of intentional discrimination. *Burdine*, 450 U.S. at 253. To prevail at this stage, the plaintiff must demonstrate that the employer’s “proffered reason was not the true reason for the employment decision and that [her protected classification] was.” *Hicks*, 509 U.S. at 507-08.

II. PLAINTIFF CANNOT ESTABLISH A *PRIMA FACIE* CASE OF DISCRIMINATION OR RETALIATION

Plaintiff cannot establish the essential elements of a *prima facie* case of ADA or FMLA retaliation or national origin or disability discrimination.

A. Plaintiff Cannot Establish A *Prima Facie* Case of FMLA Retaliation

In order to succeed on his FMLA retaliation claim, Plaintiff must first make a *prima facie* showing “that he engaged in protected activity, that the employer took adverse action against him, and that the adverse action was causally connected to the plaintiff's protected activity.” *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998). Plaintiff’s FMLA retaliation claim fails as a matter of law because (1) Plaintiff did not engage in protected activity; and (2) there is no causal connection between Plaintiff’s discharge and any protected activity in which he claims to have engaged.

1. Plaintiff Did Engage In Statutorily Protected Activity

a. Plaintiff Did Not Have A Serious Health Condition

“Unless an employee suffers from an ‘FMLA-qualifying condition’ -- that is, a ‘serious health condition,’ he would not have any FMLA rights.” *Adams v. Wallenstein*, 814 F. Supp.2d

516, 524-25 (D.Md. 2011) (citing *Rhoads v. FDIC*, 257 F.3d 373, 385 (4th Cir. 2001)). In other words, for purposes of an FMLA retaliation claim, "[i]f Plaintiff did not suffer from a serious medical condition, his leave would not have been 'FMLA leave,' and the adverse actions he alleges would not have stemmed from a protected activity." *Id.* at 525. *See also Walker v. Gambrell,* 647 F. Supp.2d 529, 540 (D.Md. 2009) ("[T]he FMLA only protects an employee from retaliation for an activity protected under the FMLA itself."); *McPhail v. Sonoco Products Co.*, No. 4:11–cv–02417–RBH, 2013 WL 4067925, at *7 (D.S.C. Aug. 12, 2013) (granting summary judgment on FMLA retaliation claim where "Plaintiff's gastroenteritis does not qualify as a "serious health condition" as defined under the FMLA" and this requirement "falls squarely within the protected activity requirement."). *Accord Lee v. U.S. Steel Corp.*, 450 F. Appx. 834, 839 (2012) (affirming summary judgment on retaliation claim, in part, because plaintiff did not engage in "statutorily protected activity" because "there was insufficient evidence to show that [he] had a 'serious medical condition'").

Federal regulations define the term "serious health condition" as "an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider. 29 C.F.R. § 825.113. Plaintiff never received any inpatient care for his June 2012 injury so if his injury is to constitute a serious health condition, he must satisfy the continuing treatment standard for chronic conditions set forth in 29 C.F.R. § 825.115. He cannot do this, however, because he never suffered a period of incapacitation and did not have a period of absence for multiple treatments related to "restorative surgery" or "[a] condition that would likely result in a period of incapacity" in relation to his June 2012 injury. *See* 29 C.F.R. § 825.115.

The term "incapacity" is defined by federal regulations as an "inability to work, attend school or perform other regular daily activities due to a serious health condition, treatment therefore, or recovery therefrom." 29 C.F.R. 825.113(b). No physician that saw Plaintiff regarding his June 2012 injuries said he could not work or was incapacitated in any way. Pl. Dep. Exs. 11-13, 17. Rather, Plaintiff was placed on light duty temporarily and continued to work subject to a lifting restriction. Pl. Dep. 76-77. Given these facts, Plaintiff did not suffer from a "serious health condition" within the meaning of the FMLA. *See e.g., Taylor v. Autozoners, LLC,* 706 F. Supp.2d 843, 850 (W.D.Tenn. 2010) ("Incapacitation for the purposes of the FMLA does not mean that, in the employee's own judgment, he or she should not work, or even that it was uncomfortable or inconvenient for the employee to have to work. (quotation marks omitted)); *Bond v. Abbott Labs.,* 7 F. Supp.2d 967, 974 (N.D. Ohio 1998) ("Determining whether an illness qualifies as a serious health condition for purposes of the Family and Medical Leave Act is a legal question that a plaintiff may not avoid simply by alleging it to be so."), *aff'd,* 188 F.3d 506 (6th Cir. 1999).

Because Plaintiff did not have a serious health condition, US Foods is entitled to judgment as a matter of law on Plaintiff's FMLA retaliation claim. [8]

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[8] Although Plaintiff's Complaint makes reference to "interference" under the FMLA, Plaintiff has not articulated how US Foods interfered with his rights under either statute. In any event, because Plaintiff did not have a "serious health condition," he cannot maintain an FMLA interference claim. *See e.g., Floyd v. Management Analysis & Utilization, Inc.*, No. 7:13–01971–JMC, 2014 WL 971937, at *5 (D.S.C. March 12, 2014) ("Before an employee can bring an interference claim, however, he must demonstrate that he was entitled to protections under the FMLA"); *Anderson v. Lockheed Martin Corp.*, No. RWT 11cv2655, 2012 WL 933215, at *4 (D.Md. March 16, 2012) ("Absent any contention in the Complaint that Plaintiff's mother suffered from a serious health condition, Plaintiff's unlawful interference claim fails."). Accordingly, judgment should be entered in US Foods' favor on any FMLA interference claim in Plaintiff's Complaint.

b. Plaintiff Did Not Otherwise Engage in Protected Activity Under The FMLA

Even if this Court were to conclude that Plaintiff had a serious health condition, Plaintiff did not otherwise engage in statutorily protected activity under the FMLA. In support of his FMLA retaliation claim, Plaintiff alleges that US Foods was motivated by "the impending possibility that Plaintiff might have to undergo an extended period of time off" when it discharged him. Compl. ¶ 69. Plaintiff also testified in his deposition that he asked Ms. Ayers about the possibility of taking time off because of the injury he allegedly sustained in June 2012. Pl. Dep. 53-54. However, this is not protected activity.

First, the mere assertion by Plaintiff that there was an "impending possibility" that Plaintiff *might* request leave does not, in and of itself, constitute an "*exercise*[] or attempt[] to exercise FMLA rights." 29 C.F.R. 825.220(c) (emphasis added). *See Wilson v. Noble Drilling Services, Inc.*, 405 F. Appx. 909, 913 (5th Cir. 2010) (granting summary judgment on FMLA retaliation claim where plaintiff's statements "that he 'might' need to take leave and that there was a 'possibility' that he would need to take leave . . . were not sufficient to make the employer aware that [he] need[ed] FMLA-qualifying leave.").

Second, although Plaintiff testified that he asked Ms. Ayers about the possibility of taking time off, he did not give any indication that he was requested FMLA-qualifying leave. Pl. Dep. 53-54. Although a plaintiff is not required to specifically state that he is asserting rights under the FMLA, he must "provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." 29 C.F.R. § 825.302(c). Plaintiff did not put US Foods on notice that he needed FMLA-qualifying leave, and therefore, his request of Ms. Ayers is insufficient as a matter of law to constitute protected activity. *See Adams*, 814 F. Supp.2d at 525; ("Adams has not established that he made any request for or otherwise took FMLA leave, as there is no indication that he hinted to anyone at MCDCR that he was taking time off because of an FMLA-related condition, that is, a serious medical condition.”). *Accord Wilson*, 405 F. Appx. at 913 (affirming summary judgment on retaliation claim because the plaintiff did not engage in protected activity when he gave his supervisor “a heads-up ... that [he] might have to take leave ... early in the year after [the baby] was here.”); *Lee*, 450 F. Appx. at 839 (affirming summary judgment where there was “insufficient evidence to show that . . . .[defendant” was on notice that his leave potentially qualified under the FMLA” where the plaintiff merely “informed his shift manager that he had injured his back while changing a tire and would be off work for three days until June 22” and never provided medical proof of incapacitation.); *Fischer v. NYC Dep’t of Educ.*, 666 F. Supp.2d 309, 318 (E.D.N.Y. 2009) (finding employee’s request for leave form did not place employer on notice of request for time off for serious medical condition and consequently did not constitute protected activity underlying retaliation claim); *Brown v. The Pension Boards*, 488 F. Supp.2d 395, 410 (S.D.N.Y. 2007) (finding that employee did not provide notice by simply calling in sick and providing vague doctor’s note, defeating employee’s retaliation claim); *Ney v. City of Hoisington, Kansas*, 508 F. Supp.2d 877, 887 (D. Kan. 2007) (finding no protected activity where employee did not fill out paperwork requesting FMLA leave), *aff’d*, 264 Fed. Appx. 678 (10th Cir. 2008); *Henegar v. Daimler–Chrysler Corp.*, 280 F. Supp.2d 680, 688 (E.D. Mich. 2003) (“[T]he Plaintiff must show that he availed himself of a protected right under the FMLA by notifying his employer of his need to take leave for a serious health condition.”).

Because Plaintiff did not engage in statutorily protected activity, US Foods is entitled to judgment as a matter of law on Plaintiff’s FMLA retaliation claim.

2. There Is No Causal Connection Between Any of the Alleged Protected Activity and Plaintiff's Discharge

Even if this Court were to assume that Plaintiff engaged in protected activity under the FMLA, there is no causal connection between any protected activity and Plaintiff's discharge because there is no record evidence that any of the individuals involved in the decision to discharge Plaintiff were aware of either the "impending possibility" of Plaintiff taking "extended leave" or that he asked Ms. Ayers about the possibility of taking time off.

There is no record evidence that any of the decisionmakers were under the impression Plaintiff might need extended leave. With regard to the alleged possibility of extended leave, Plaintiff deposed only three of the individuals who were on the November 1 call in which US Foods made the decision to discharge Plaintiff. Mr. Pillion testified that the extent of his knowledge about Plaintiff's June 2012 injury was that Plaintiff had been on light duty once. Pillion Dep. 22. Likewise, Ms. Rutherford testified that she knew Plaintiff had experienced a work-related injury and that he was on light duty at one time. Rutherford Dep. 9. Mr. Barrett was asked if he was aware of Plaintiff having health issues of any kind, and he testified he was not aware of any. Barrett Dep. 46-47. In addition, as for his alleged request of Ms. Ayers, there is no evidence that any of the decisionmakers in Plaintiff's discharge were aware of this request. Ms. Ayers herself was not involved in the decision to discharge Plaintiff. Ayers Dep. 16; See Answer to Interrogatory No. 3 of Plaintiff's First Set of Interrogatories.[9]

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[9] Moreover, the medical records produced by Plaintiff in this case give no indication that Plaintiff would need to take extended leave. None of the doctors who saw Plaintiff stated he needed to be absent from work at all, much less on extended leave, as a result of the June 2012 injuries. Indeed, Plaintiff did not miss any work as a result of the June 2012 injuries other than to attend doctors' appointments. Pl. Dep. 55. Plaintiff was on light duty for a mere two weeks. Pl. Dep. 76-77.

The fact that the decisionmakers were unaware of Plaintiff's alleged protected activity is fatal to Plaintiff's FMLA retaliation claim. "[I]f the 'relevant official' was unaware of the protected activity at the time of the alleged retaliation, there can be no causal link between the two events." *Ferrell v. Great Eastern Resort Corp.*, No.: 5:13cv00075, 2014 U.S. Dist. LEXIS 159274, at *19 (W.D.Va. Nov. 12, 2014) (citing *Baqir v. Principi*, 434 F.3d 733, 748 (4th Cir. 2006)). As the Fourth Circuit has held:

> To satisfy the third element [of a *prima facie* case of retaliation], the employer must have taken the adverse employment action because the plaintiff engaged in a protected activity. Since, by definition, an employer cannot take action because of a factor of which it is unaware, the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary to establish the third element of the *prima facie* case.

Dowe v. Total Action Against Poverty, 145 F.3d 653, 657 (4th Cir. 1998) (internal citations omitted).

Accordingly, Plaintiff cannot, as a matter of law, establish a *prima facie* case of FMLA retaliation, and on this basis alone, Plaintiff's FMLA retaliation claim must be dismissed.

B. Plaintiff Cannot Establish A *Prima Facie* Case of ADA Retaliation

Plaintiff alleges he was discriminated against because he requested an accommodation for a disability under the ADA (*i.e.*, Plaintiff required light duty because of the work restrictions imposed by his doctors, and he also claims to have asked Ms. Ayers about taking time off). To establish a *prima facie* claim of ADA retaliation, a plaintiff must prove (1) he engaged in protected conduct, (2) he suffered an adverse action, and (3) a causal link exists between the protected conduct and the adverse action. *See A Soc'y Without a Name v. Commonwealth of Va.*, 655 F.3d 342, 350 (4th Cir. 2011).

1. There Is Insufficient Temporal Proximity To Establish A Causal Link

Plaintiff cannot establish a *prima facie* case of ADA retaliation because there is no record evidence that establishes the required causal link between his work restrictions and the termination of his employment. Plaintiff was placed on light duty as of June 29, 2012, and he was released back to full duty on July 16, 2012. Pl. Dep. 76-77. Plaintiff was not discharged until November 1, 2012. Pl. Dep. 154-55. Courts have held that a period of three or four months between protected activity and adverse employment action is insufficient to establish a causal link between the two. *See e.g., Clark Cnty. School Dist. v. Breeden,* 532 U.S. 268, 273-74 (2001) (explaining that, for purposes of a retaliation claim, temporal proximity must be "very close" and approving of a case that deemed a three-month period insufficient); *Atkins v. Holder,* 529 F. Appx. 318, 321 (4th Cir. 2013) (holding that termination that came four months after the filing of the EEOC complaint was "not temporally very close to [the] protected activity"); *Perry v. Kappos*, 489 F. Appx. 637, 643 (4th Cir. 2012) ("a three-month lapse is too long to establish causation, without more"); *Pascual v. Lowe's Home Ctrs., Inc.,* 193 F. Appx. 229, 233 (4th Cir. 2006) (per curiam) (unpublished) (holding that "three to four months . . . is too long to establish a causal connection by temporal proximity alone").

2. Plaintiff's Violation of US Foods' Workplace Violence Policy Is An Intervening Event That Severs Any Causal Connection Between Any Protected Conduct and Plaintiff's Discharge

Even if this Court were to conclude that temporal proximity between Plaintiff's protected conduct and his discharge raised an inference of retaliation, Plaintiff's violation of US Foods' workplace violence policy served as an intervening event that severed any purported causal connection between Plaintiff's protected conduct and his discharge. *See e.g., Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014) (affirming summary judgment on SOX retaliation claim where a number of instances that led the decision makers to view plaintiff as insubordinate constituted “legitimate intervening event[s]” that “sever[ed] the causal connection between protected activity and discharge); *Bullock v. Kraft Foods, Inc.*, No. 3:11-CV36-HEH, 2011 U.S. Dist. LEXIS 134481, at * 29 (E.D.Va. Nov. 22, 2011) (“weak inference of causation” based on “chronological closeness” is “eroded by the lion's share of evidence suggesting that Bullock's failure to comply with the company attendance policy” precipitated her discharge), *aff’d*, 501 F. Appx. 299 (4th Cir. 2012) ; *Todd v. Fed. Express Corp.*, No. 4:09-cv-1501-TLW-KDW, 2012 U.S. Dist. LEXIS 80093, at *47 (granting summary judgment on retaliation claim where “the reporting of [plaintiff’s] falsification of delivery records by the FedEx dispatcher constitutes an intervening event between her [protected activity] and termination”), adopted in relevant part, 2012 U.S. Dist. LEXIS 129511 (D.S.C. September 12, 2012): *Christy v. City of Myrtle Beach*, No. 4:09-1428-JMC-TER, 2012 U.S. Dist. LEXIS 81954, at *7 (D.S.C. Apr. 26, 2012), adopted, 2012 U.S. Dist. LEXIS 81499 (June 13, 2012). *Accord Kuhn v. Washtenaw County*, 709 F.3d 612, 628 (6th Cir. 2013) (“[A]n intervening legitimate reason to take an adverse employment action dispels an inference of retaliation based on temporal proximity.”) (quoting *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 472 (6th Cir. 2012)); *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1001-02 (10th Cir. 2011) (holding evidence of temporal proximity has minimal probative value in a retaliation case where intervening events between the employee's protected conduct and the challenged employment action provide a legitimate basis for the employer's action” and affirming summary judgment where unreported absences constituted “intervening events”); *Breeden v. Novartis Pharms. Corp.*, 646 F.3d 43, 53-55 (D.C. Cir. 2011) (affirming summary judgment on FMLA retaliation claim where intervening event severed the causal connection between protected activity and discharge); *Caskey v. Colgate-Palmolive Co.*, 535 F.3d 585, 594 (7th Cir. 2008) (finding the plaintiff was unable to make a causal connection even though she was disciplined and terminated shortly after her injury where there were several intervening events, including a series of unexercised absences, leading to her termination); *Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 847, 852 (8th Cir. 2005) (summary judgment on retaliation claim affirmed where "intervening events" in which plaintiff "missed many days of work and was in fact laid off on a day when she was skipping work . . . eroded any causal connection suggested by the temporal proximity of [plaintiff's] protected conduct and her layoff").[10]

Accordingly, no causal connection can be established between any alleged protected conduct by Plaintiff and Plaintiff's discharge because of his intervening violation of US Foods' policy against workplace violence.

C. Plaintiff Cannot Establish A *Prima Facie* Case of Either Disability Or National Origin Discrimination

Plaintiff alleges that he was discriminated against based on his national origin (Bahamian) and an actual or perceived disability. Under Title VII, Plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he was qualified for the position he filled; (3) he suffered some adverse employment action; and (4) a similarly situated employee not a member of the protected class was treated more favorably. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a *prima facie* case of disability discrimination, "a plaintiff must show that: (1) she is disabled; (2) she was otherwise qualified for the position; and (3) she suffered an adverse

[10] The legal principle that an intervening event severed the causal connection between any protected activity and Plaintiff's discharge applies with equal force to Plaintiff's FMLA retaliation claim as is evident from the *Breeden* case, *supra*, in which the D.C. Circuit affirmed summary judgment on an FMLA retaliation claim where the intervening event broke the causal connection between alleged protected activity and discharge. This is an entirely separate ground for entering judgment in favor of US Foods on Plaintiff's FMLA retaliation claim.

employment action solely on the basis of the disability." *Perry v. Computer Science Corp.*, 429 F. Appx. 218, 220 (4th Cir. 2011).

1. Plaintiff Was Not Disabled Within The Meaning of the ADA

"In order to make out a *prima facie* case of disability discrimination . . . [the plaintiff] must first establish that he is an individual with a disability." *Lyons v. Shinseki*, 454 F. Appx. 181, 182-83 (4th. Cir. 2011) (citing *Haulbrook v. Michelin N. Am.*, 252 F.3d 696, 702 (4th Cir. 2001)). Plaintiff claims that he has two impairments that constitute disabilities under the ADA: an impairment to one of his legs and the neck injury he suffered in June 2012. Pl. Dep. 224-25. An individual has an ADA-qualifying disability if he:

> (A) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) [has] a record of such an impairment; or
>
> (C) [is] regarded as having such an impairment.

42 U.S.C. 12102(1). "An impairment is a disability [under the ADA] if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." 29 C.F.R. § 1630.2(j)(1)(ii). There is no record evidence that suggests, much less establishes that either Plaintiff's leg impairment or his June 2012 injury constituted disabilities under the ADA.

a. Plaintiff's Leg Impairment

Plaintiff has had an unspecified "issue" with his right leg since childhood that resurfaced when he injured his leg in 2004. Pl. Dep. 252-253. He had surgery on his right leg in 2008 and took three months of FMLA leave. Pl. Dep. 48-49. However, the mere fact that Plaintiff had surgery on his leg some years ago does not establish he has a disability because "temporary impairments" are generally not considered "a substantial limitation on a major life activity."

Pollard v. High's of Baltimore, Inc., 281 F.3d 462, 468–69 (4th Cir. 2002) (nine-month absence because of surgery to repair a back injury insufficient to show a substantial limitation on a major life activity). Plaintiff also alleges he walks with a limp. Pl. Dep. 224. However, even if Plaintiff were able show that his limp limited his ability to walk, there is no record evidence that his limp *substantially* limited his ability to walk. "Walking is a major life activity. However, an allegation of some walking limitation is not an allegation of specific facts that create a plausible claim of a substantial walking limitation." *Quarles v. Maryland Dept. of Human Resources*, No. MJG-13-3553, 2014 U.S. Dist. LEXIS 168483, at *10-11 (D.Md. Dec. 5, 2014) (granting motion to dismiss because the plaintiff "has not presented a plausible claim that she is disabled under the ADA").

Moreover, there is no evidence that US Foods regarded Plaintiff as disabled based on his leg impairment. To present a plausible claim that US Foods regarded him as being disabled, Plaintiff must allege specific facts indicating that US Foods:

> (1) "mistakenly believe[d] that [she] has a physical impairment that substantially limits one or more major life activities," or
>
> (2) "mistakenly believe[d] that an actual, nonlimiting impairment substantially limits one or more major life activities."

Quarles, 2014 U.S. Dist. LEXIS 168483, at *4 (quoting *Rhoads*, 257 F.3d at 390-91 (citation omitted) (alteration in original)); *see also* 42 U.S.C. § 12102(3)(A). Thus, "when an employee [contends] that he was regarded as disabled, the analysis 'focuses on the reactions and perceptions of the . . . decisionmakers' who worked with the employee." *Quarles*, 2014 U.S. Dist. LEXIS 168483, at *12 (quoting *Wilson v. Phoenix Specialty Mfg. Co.*, 513 F.3d 378, 384-85 (4th Cir. 2008)).

There is no record evidence that any of the decisionmakers in Plaintiff's discharge were aware of his leg impairment, except Ms. Rutherford, who only learned about it when Plaintiff came to her office and told her he had scraped and punctured his leg in 2004. Rutherford Dep. 21. Aside from what Plaintiff told her, Ms. Rutherford did not have any information about what was wrong with his leg. *Id*. In sum, Plaintiff's leg impairment is not an ADA disability and cannot form the basis for an ADA disability discrimination claim.

b. Plaintiff's June 2012 Injury

As for the injury that occurred in 2012, Plaintiff cannot establish that this impairment constituted an ADA disability either. None of the doctors who Plaintiff saw for this injury stated he needed to miss work as a result of it. Pl. Dep. Exs. 11-13, 17. He was merely placed on light duty for two weeks with 25-pound lifting restriction. Pl Dep. 76-77. This is insufficient as a matter of law to establish that his June 2012 injury substantially affected a major life activity and constituted an ADA disability. *See e.g., Lyons v. Shinseki*, 454 F. Appx. 181, 183 (4th Cir. 2011) (affirming summary judgment on grounds that plaintiff did not have disability where "Lyons has failed to produce probative evidence that his inability to lift more than twenty-five pounds constitutes a substantial limitation"); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996), abrogated on other grounds by *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999) (affirming summary judgment and holding "as a matter of law, that a twenty-five pound lifting limitation--particularly when compared to an average person's abilities--does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity") (citing *Aucutt v. Six Flags Over Mid-America*, 85 F.3d 1311, 1319 (8th Cir. 1996) (twenty-five pound lifting restriction did not "significantly restrict" major life activities)).

Although some of the decisionmakers in Plaintiff's discharge were aware that Plaintiff was on light duty due to a lifting restriction, there is no basis on which a reasonable factfinder could conclude that any of them regarded Plaintiff as disabled because he was on light duty with a 25-pound lifting restriction for two weeks. "An employer's knowledge of an impairment is insufficient to show that the employer regarded the employee as having a disability." *Howell v. Holland*, No. 4:13-cv-00295-RBH, 2015 WL 751590, at *16 (D.S.C. Feb. 23, 2015) (citing *Haulbrook v. Michelin North America,* 252 F.3d 696, 703 (4th Cir. 2001)). *See also Teasdell v. Baltimore Cty. Bd. Of Educ.*, No. WDQ-13-107, 2014 WL 7188996, at *3 (D.Md. Dec. 16, 2014) (granting summary judgment where the plaintiff did not establish a substantial limitation on a major life activity where "Teasdell's medical records merely show that - after the June 23, 2011 injury - she was on light duty work from June 29, 2011 until October 4, 2011."); *Clark v. Tidewater Regional Jail Authority,* No. 2:11cv228, 2012 WL 253108, at *7 (E.D.Va,. Jan. 26, 2012) ("The Court is unable to conclude that a three week restriction on Clark's ability to stand for prolonged periods of time constitutes a substantial limitation on the major life activity of standing."); *Cobey v. Green*, 424 F. Appx. 209, 212 (4th Cir. 2011) (granting summary judgment for movant where medical records indicated that claimant's physical limitations, including standing for long periods of time, were only temporary).

Moreover, even if Plaintiff could show that US Foods regarded him as disabled during his period of light duty, this would be irrelevant because he was released back to full duty over three months before his discharge. Thus, there would still be no evidence that US Foods regarded him as disabled at the time of his discharge, and thus, his discriminatory discharge claim fails. *See Bateman v. American Airlines, Inc.*, 614 F. Supp.2d 660, 672 (E.D.Va 2009) (granting motion for summary judgment on ADA wrongful termination claim because "even if American regarded him as disabled at some point during his recovery period, there are no facts suggesting that American still held that perception at the time of his discharge.")

For these reasons, Plaintiff has not shown, as a matter of law, that he suffered from an ADA disability at the time of his discharge, and for this reason alone, judgment should be entered in US Foods' favor on Plaintiff's disability discrimination claim.

2. Plaintiff Cannot Identify Any Similarly Situated Employees Outside His Protected Classifications Who Were Treated More Favorably

Plaintiff cannot establish a *prima facie* case of either disability or national origin discrimination because he cannot show that similarly situated employees outside of his protected classifications were treated more favorably than him. Plaintiff has speculated about a number of Manassas delivery drivers who he claims violated the workplace violence policy but were not discharged. However, the only incident that Plaintiff can describe with any particularity is one that occurred about ten years ago in which Kelvin Howard, a Manassas delivery driver, had a confrontation with Transportation Supervisor Bruce Hommel and was suspended as a result. Howard Dep. 18, 20; Pl. Dep. 194-95.

However, the incident with Mr. Howard cannot be used to raise an inference of either disability or national origin discrimination because Mr. Howard is not similarly situated to Plaintiff. A plaintiff who tries to raise an inference of discrimination or retaliation by making "a comparison to an employee from a non-protected class must demonstrate that the comparator was 'similarly situated' in all relevant respects." *Crawford v. Dep't of Corr. Educ.*, No. 3:11-CV430-HEH, 2011 WL 5975254, at *6 (E.D. Va. Nov. 29, 2011), *aff'd*, 472 F. Appx. 192 (4th Cir. 2012) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981)). Mr. Howard is not similarly situated to Plaintiff with regard to this discipline because (1) his suspension took place approximately seven years prior to Plaintiff's discharge; and (2) the same decisionmakers were not involved in Plaintiff's discharge and Mr. Howard's suspension.

Because Mr. Howard's suspension took place approximately ten years ago (*i.e.*, approximately seven years before Plaintiff's discharge), Mr. Howard is not similarly situated to Plaintiff and his suspension is too remote in time to Plaintiff's discharge to raise an inference of discrimination. *See e.g., Hurst v. District of Columbia*, No. CIV. PWG-12-2537, 2015 WL 1268173, at *7 (D. Md. Mar. 16, 2015) (employees who engaged in similar conduct as plaintiff are not similarly situated because their conduct, which occurred more than five years before plaintiff's, was "too temporally remote to support an inference of discrimination"); *Epps v. First Energy Nuclear Operating Co.*, No. 11–462, 2013 WL 1216858, at *19 (W.D.Pa. Mar. 25, 2013) (concluding that the disciplinary incident involving the alleged comparator was "too remote in time from [plaintiff's] incident, which occurred more than four and a half years later, ... to raise a reasonable inference of discrimination" (emphasis in original)); *Tibbs v. Calvary United Methodist Church*, 505 F. Appx. 508, 515-16 (6th Cir. 2012). (concluding that "comparators were not similarly situated in that there is no temporal nexus to the events here" when disciplinary decisions concerning comparators were seven months to two years removed from plaintiff's termination); *Hughes v. City of Indianapolis*, No. 1:10-CV-806-SEB-DML, 2012 WL 1682032, at *10 (S.D. Ind. May 14, 2012) (employee who engaged in one incident of workplace violence which took place eight years prior to plaintiff's termination of employment was not similarly situated); *Newton–Haskoor v. Coface N. Am.*, No. 11–3931, 2012 WL 1813102 at *5 (D.N.J. May 17, 2012) (concluding that "the nature of the parties' alleged behavior is too dissimilar and the time periods in which the behaviors occurred [approximately two years apart] are too remote to conclude the two were 'similarly situated' so as to permit the inference [of discrimination] advanced by Plaintiff"), *aff'd*, 524 F .Appx. 808 (3d Cir. 2013); *Lee v. Kansas City So. Ry.*, 574 F.3d 253, 259 (5th Cir. 2009) ("Employees . . .who were the subject of adverse employment actions too remote in time from that taken against the plaintiff generally will not be deemed similarly situated.”).

In addition, Mr. Howard is not similarly-situated to Plaintiff with respect to his discipline because the decisionmakers involved in the Mr. Howard’s discipline were different that those involved in Plaintiff’s discharge. For example, Ms. Rutherford was not hired as the H.R. Manager in the Manassas division until 2007, and Mr. Barrett did not come to the Manassas division until 2009. Rutherford Dep. 125; Pl. Dep. 194; Barrett Dep. 21. Since Ms. Rutherford and Mr. Barrett have been at the Manassas division, in each instance in which an employee has been found to have violated the workplace violence policy, the person has been discharged. Defendant’s Answer to Plaintiff’s Interrogatory No. 5.[11]

“If different decision-makers are involved, employees are generally not similarly situated.” *Forrest v. Transit Mgmt. of Charlotte, Inc.*, 245 F. Appx. 255, 257 (4th Cir. 2007). *See also Hurst*, 2015 WL 1268173, at *4 (“without showing that the comparators had the same supervisor, Plaintiff has failed to show that they were similarly situated”); *Allen v. Dorchester Cnty., Md.*, No. ELH-11-01936, 2013 WL 5442415, at *14 (D.Md. Sept. 30, 2013) (finding employees were not similarly situated where decision makers who imposed plaintiff’s discipline differed); *Merritt v. Old Dominion Freight Line, Inc.*, No. 6:07-CV-27, 2011 WL 322885, at *9 (W.D.Va. Feb. 2, 2011) (“Whether the comparators dealt with the same decision maker is paramount.”). Thus,

[11] In addition, a different workplace violence policy was in place at the time Mr. Howard was suspended. US Foods issued a new policy against workplace violence in 2011. Rutherford Dep. 137. With the issuance of this 2011 policy, there was a new emphasis and heightened awareness regarding workplace violence, and US Foods issued a set of Standard Operating Procedures (SOP) in connection with the 2011 policy. Rutherford Dep. 137; Barrett Dep. 19-22. Thus, Plaintiff was discharged at a time when a new policy and procedure that affected decision-making had been implemented.

because Mr. Howard is not similarly-situated to Plaintiff, his suspension cannot be used to raise an inference of discrimination.

III. US FOODS HAD A LEGITIMATE NONDISCRIMINATORY REASON FOR PLAINTIFF'S DISCHARGE THAT HE CANNOT SHOW IS PRETEXTUAL

Even if Plaintiff were able to establish a *prima facie* case of retaliation or discrimination, US Foods can easily satisfy its burden of production as to the existence of a legitimate nondiscriminatory reason for Plaintiff's discharge, and, as a matter of law, Plaintiff cannot demonstrate that this reason is pretext for discrimination or retaliation.

A. US Foods Had A Legitimate Nondiscriminatory Reason for Plaintiff's Discharge

As set forth in detail in the Statement of Material Facts As To Which There Is No Genuine Issue, *supra*, US Foods had ample basis on which to conclude that Plaintiff violated the workplace violence policy. Not only did US Foods have Plaintiff's admissions in his statement and his conversations with Ms. Rutherford, it had Mr. Butym's statement that he had to physically restrain Plaintiff to break up the altercation and Mr. Summers' confirmation that this was the case. See paragraphs 27-39, *supra*.

Plaintiff has tried to wiggle out from underneath the admission in his statement and in his interviews with Ms. Rutherford, by saying that, although he did say the words he admitted to saying in his statement and in his interviews, he said them in such a way and such a place that Mr. Abdullah could not have heard him. On this basis, Plaintiff disagrees with US Foods' conclusion that he violated the workplace violence policy. Yet, even though his job was on the line, Plaintiff never submitted anything in writing to US Foods recanting or correcting the written statement he provided during the investigation. Pl. Dep. 117-18. Moreover, Plaintiff is entirely ignoring the fact that Mr. Butym and Mr. Summers stated that Plaintiff had to be physically restrained in order to separate him from Mr. Abdullah. Rutherford Dep. 51, 62-63;

Grossenbacher Decl. at Att. A and B. In any event, it is well-settled that a plaintiff cannot establish pretext merely by disagreeing with his employer's determination that his conduct warranted discharge. *See e.g., Mercer v. Arc of Prince George's Cnty., Inc*., 532 F. Appx. 392, 399 (4th Cir. July 11, 2013) ("the Court's task is not to decide whether the reason for termination of employment was wise, fair, or even correct, ultimately, so long as it truly was the reason for the decision.") (quoting *Laing v. Fed. Exp. Corp*., 703 F.3d 713, 722 (4th Cir. 2013))*;* *Mereish v. Walker*, 359 F.3d 330, 339 (4th Cir. 2004) ("Appellants may disagree with Franz's conclusion as to which positions to eliminate, but the ultimate responsibility for that judgment lies with Franz. Our focus is solely on whether this decision was the result of age bias"). Moreover, courts do not sit as super-personnel departments that reject an employer's reason for a discharge because they might have come to a different conclusion. *Beall v. Abbott Labs.*, 130 F.3d 614, 620 (4th Cir. 1992) ("this Court will not act as a super-personnel department that reexamines an entity's business decisions.").

B. Plaintiff Cannot Show That US Foods' State Reason For His Discharge Is A Pretest For Discrimination or Retaliation

Plaintiff bears the burden of establishing that US Foods' legitimate non-discriminatory reason for his discharge is a pretext for illegal retaliation or discrimination. "'Pretext' in this context means deceit designed to hide unlawful discrimination." *Westry v. North Carolina A&T State University*, 286 F. Supp.2d 597, 601 (D. Md. 2003), *aff'd*, 94 F. Appx. 1 (4th Cir. 2004) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000)).

1. No Reasonable Jury Could Conclude That ADA or FMLA Retaliation Was The Real Reason for Plaintiff's Discharge

With regard to the retaliation claims, Plaintiff has not alleged that anyone at US Foods made any negative comments to him requesting light duty or time off for medical appointments or his past use of FMLA leave or desire to take leave for his alleged June injuries. Indeed, the

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fact that Plaintiff took three months of FMLA leave in 2008 and returned to work without incident only serves undermines his FMLA retaliation claim. *See e.g., Pruitt v. Peninsula Regional Medical Center*, No. GLR–14–344, 2014 WL 2916863 (D.Md. June 25, 2014) ("PRMC's approval of Pruitt's prior FMLA requests further strengthens its argument that Pruitt was discharged for a legitimate reason."); *Yashenko v. Harrah's N.C. Casino Co.,* 352 F. Supp.2d 653, 662 (W.D.N.C. 2005) ("The fact that the Defendant had historically and regularly granted Plaintiff medical leave followed by the full restoration of his employment is evidence that Defendant acted without discriminatory intent .... " (citing *Dodgens v. Kent Mfg. Co.*, 955 F. Supp. 560, 566 (D.S.C. 1997))), *aff'd*, 446 F.3d 541 (4th Cir. 2006).

Plaintiff appears to be relying on the proximity of his alleged June 2012 injury to his discharge to establish the stated reason for his discharge were a pretext for retaliation. However, case law is clear that temporal proximity alone between the alleged protected activity and the adverse employment action is insufficient to establish pretext. *See Mercer v. Arc of Prince Georges County, Inc.*, 532 Fed. Appx. 392, 397 (4th Cir. 2013) (affirming summary judgment because "[w]hile timing is a relevant factor, it will rarely be independently sufficient to create a triable issue of fact"); *Eadie v. Anderson County Disabilities & Special Needs Bd.*, No. 8:07-3406-HMH-WMC, 2009 U.S. Dist. LEXIS 17472 (D.S.C. Mar. 3, 2009) ("While temporal proximity is sufficient to meet the low burden required to establish a *prima facie* case of retaliation in violation of the FMLA, it is not alone sufficient to establish that an employer's legitimate, non-discriminatory reason for discharge was a pretext"), *aff'd,* 382 Fed. Appx. 338 (4th Cir. 2010).

Moreover, as set forth in Section I.A.2, *supra*, there is no record evidence that any of the decisionmakers in Plaintiff's discharge were aware of Plaintiff's request for leave to Ms. Ayers or that Plaintiff had previously taken FMLA leave. Although some of the people on the call did know about Plaintiff's brief period of light duty in July 2012, those people also knew that Plaintiff had been released to full duty for over three months at the time of his discharge. There is simply no way a reasonable jury could conclude that the real reason for Plaintiff's discharge was either his exercise of FMLA rights or the accommodation of his June 2012 injury.

2. No Reasonable Jury Could Conclude That Disability or National Origin Discrimination Was The Real Reason for Plaintiff's Discharge

Plaintiff was born in the Bahamas and came to the United States in 1981. Pl. Dep. 104. Plaintiff claims that "everybody" knew he was from the Bahamas because of his accent and that he told Mr. Bunk, Mr. Pillion and Ms. Rutherford that he was from the Bahamas. Pl. Dep. 105-07. If, as Plaintiff claims, everyone knew he was from the Bahamas, including management, it makes no sense to claim that, after Plaintiff had been working for US Foods for over 15 years, management decided, all of a sudden, in October 2012, to discharge him because he is from the Bahamas. Plaintiff has no evidence whatsoever that his national origin played any role in his discharge. Likewise, Plaintiff has no evidence whatsoever that disability discrimination played any role in his discharge. As set forth in Section II.C.1.b, *supra*, although some of the decisionmakers in Plaintiff's discharge were aware he was on light duty, there is no evidence they regarded Plaintiff as disabled or would have had any reason to discharge him based on his brief two-week period of light duty.

In short, no reasonable juror could find that Plaintiff's discharge was motivated by FMLA or ADA retaliation or disability or national origin discrimination. For these reasons, US Foods is entitled to judgment as a matter of law on Plaintiff's Complaint.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that their motion be granted.

Dated: April 20, 2015

Respectfully submitted,

US FOODS, INC.

By: /s/ Taron K. Murakami

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Defendant US Foods, Inc.'s Motion for Summary Judgment was served, via ECF, this 20th day of April, 2015, upon:

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